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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

31745 #36
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No. 196

GEORGE J. ROBINSON,
Petitioner,

vs.

CITY OF BATON ROUGE, LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL G. BORRON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 196

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CITY OF BATON ROUGE, LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

A.

Statement of the Case.

1.

Petitioner, George J. Robinson, a resident and citizen of the State of Arkansas, prosecuted suit against the respondent, City of Baton Rouge, in the District Court of the United States, Eastern District of Louisiana, Baton Rouge Division, to recover the sum of $13,095.95, with legal interest thereon from the 11th day of January, 1932, being alleged balance arising under a contract for the installation of approximately 22 miles of sanitary sewerage in the City of Baton Rouge.

2.

The amount sued for was made up of five separate counts or claims, as follows:

(1) The amount of $3,150 withheld or deducted by the appellant out of the amount due appellee as a penalty for alleged delay in completion of the project.

(2) The sum of $6,876.48, balance due for material and labor for the installation of 42,978 linear feet of house service pipe installed in excess of the call of the contract on the basis of 42¢ per linear foot on which appellee had been allowed and paid only 26¢ per linear foot.

(3) $981.75, cost of repaving 255 square yards of undamaged pavement on Gayosa Street, beyond contract requirement.

(4) The amount of $1,227.96, covering cost and labor of trenching and back-filling and restoration of street necessary in the installation of ⅛ bends not called for by the plans and specifications.

(5) The amount of $859.76, balance due for extra work and material furnished by plaintiff on the project (R. 4 to 14).

3.

The trial court gave judgment in favor of the petitioner in the amount of $9,706.48, being the amount of counts or claims 1 and 2 above stated, with legal interest thereon from January 11, 1932, until paid, and disallowed claims or counts 3, 4 and 5 (R. 245, 246).

4.

The respondent, City of Baton Rouge, appealed to the United States Circuit Court of Appeals, Fifth Circuit, and petitioner cross-appealed from the judgment of the trial court insofar as it disallowed claims 3, 4 and 5 (R. 260-261).

5.

On the 28th day of April in the year 1942, the Circuit Court of Appeals rendered judgment reversing in part the judgment of the trial court, insofar as the judgment allowed recovery to petitioner on count or claim 2 above stated, and otherwise affirmed the judgment (R. 269).

6.

In due course, petitioner applied to the Circuit Court of Appeals for rehearing as to that part of its judgment reversing in part the judgment of the trial court which allowed petitioner judgment for claim 2, or $6,556.48, with interest at 5 per cent per annum from January 11, 1932, as additional compensation, on a quantum meruit basis, for furnishing and installing 40,978 linear feet of house service pipe in excess of the call of the contract (R. 273).

7.

That the basis of count or claim 2 above and presented here is set forth in the petition filed in the trial court as follows:

> "(c) That under the provisions of said contract, all items were stated to be approximate quantities; that the contract specifies 40,000 linear feet of house service connections; that the said Commission Council of the City of Baton Rouge, acting through its said engineer, required and compelled your petitioner to install 83,000 linear feet of such service connections or lines; that at the time your petitioner was called upon to install this additional house service line, your petitioner notified the City of Baton Rouge, through its proper representative, in writing, that in submitting his bid for said work he had made an error in the price in the performance of this particular item in the contract by stating the price to be $.26¢ per linear foot, and that any additional quantity which your petitioner was re-

quired to install under this item, your petitioner would be compelled to charge at the price of $.42¢ per linear foot, which charge was reasonable and in line with the price fixed by other competitive bidders on said project, covering said item.

"(c) 1. That your petitioner verily believes, and believing so alleges that the said engineer and the Commission Council of the City of Baton Rouge, realizing that the bid and contract price on said item was far below actual cost, and in an attempt to take advantage of the error made by your petitioner in his bid as to the price covering this said item, called upon or required your petitioner to make unnecessary extensions of service lines where there were located no residences and no probability of erection of residences for years, with the result, if allowed, of enriching the said City of Baton Rouge at the expense of your petitioner as the result of an apparent error.

"(c) 2. That said additional quantity of service lines which your petitioner was arbitrarily required to furnish was far in excess of any approximation of quantity, as provided by the contract; that your petitioner is entitled to be paid a fair and reasonable price for such service pipes furnished by him in excess of 40,000 linear feet, which excess of quantity called for by the contract was 42,978 linear feet; that a reasonable and fair price for such extra or excess quantity of service pipes was, at the time same were furnished by petitioner as aforesaid, the price of $.42¢ per linear foot or the sum of $18,050.76; that your petitioner has been paid for such item at the rate of $.26¢ per linear foot, amounting to $11,174.28, leaving a balance due at the rate of $.16¢ per linear foot or $6,876.48 (R. 10-12).

8.

The defense to the claim set up in answer, in effect, is that immediately after bids were received and before awarding contract, and sometime before the contract was executed and signed, the Council and consulting engineer stated to

petitioner that he would be held to a strict compliance with all the provisions of the Specifications and bid thereunder; that if any error had been made in making his bid the Council would reject the bid rather than accept it and cause loss to the contractor because of the low amount fixed by him on certain of the items for which he would be held strictly accountable; that although the quantity of house service pipe under Item No. 71 of the specifications was given as 40,000 linear feet, that this may run to 80,000 or more linear feet; that the contractor at this pre-contract conference stated there was no error in his bid and that he was prepared to install 80,000 or more linear feet of pipe at the unit price of his bid (R. 36, paragraph (c); R. 79; R. 137).

9.

Thereafter, on December 29, 1930, the contract was awarded to petitioner; and on January 6, 1931, it was signed, *and specifically calls for the installation of 40,000 linear feet of 6" T. C. house service pipe* (R. 194, Item 71; R. 210).

10.

Petitioner filed motion to strike out the allegations of the answer in defense of this claim, on the ground that no testimony was admissible to prove statements or conversations between the parties prior to the execution of the contract. The motion was referred by the trial court to the merits, with all rights reserved (R. 50).

On trial, when evidence was offered to support the defense alleged by respondent, objection was urged by petitioner's counsel on the grounds set forth in the motion to strike, as follows:

> "I object to any evidence attempted to be elicited from this witness at that conference which would tend to show, or attempt to show that there was any verbal

agreement or understanding as to this service pipe between the individual Commissioners or the engineers, for the reason that this conversation, or whatever conversation they had, was had long prior to the execution of the contract, or that any statements or understanding that may have been had verbally between the parties at that time is inadmissible and irrelevant to change or alter the written contract sued on."

(The motion to strike and objection to the testimony was based on the following authorities: Article 2276 of the Revised Civil Code of Louisiana provides:

"Neither shall parol evidence be admitted against nor beyond what is contained in the act, nor what may have been said before or at the time of making them or since."

"Parol evidence is inadmissible against or beyond what is contained in the acts, and in regard to what may have been said before, at the time of or after their execution." (Calderwood *v.* Calderwood, 23 Ann. 658, approved in Gautreaux *v.* Harang (1938), 190 La. 1089); Gould *v.* Bridgers, 3 Mart. (N. S.), 692; Fudickar *v.* Inabenet, et al., 176 La. title page 777; discussion at page 785.

"A written contract is the evidence of what the parties agreed to, and cannot be varied by parol evidence or other contemporaneous stipulations." Second syllabi, E. Van Winkle & Company *v.* Canty Crowell, et al., 146 U. S. 42, 36 L. Ed. 880).

11.

The trial court reserved ruling on the objection and directed that the ruling of the court would apply to all other testimony of similar or like nature, and counsel for plaintiff was also reserved a bill of exception to the court's ruling, without the necessity of pleading same (R. 79). *The trial judge apparently, in effect, sustained the objection to the testimony in that he ignored it in his decision.*

12.

That the errors pointed out and relied on in the application for rehearing are as follows:

"*First*, the learned Court has erred in invoking as a ground of reversal of the judgment of the trial Court the provisions of paragraph 8 of the Specifications,

"(a) for the reason said paragraph 8 was not pleaded or urged and submitted to the trial Court by the defendant and appellant as a defense to this claim; that the theory of the defense before the trial Court was based on other and different grounds.

"*Second*, the learned Court, having erred as above set forth in the first paragraph, further erred in holding or finding that 'it appears that the parties intended this provision' (meaning paragraph 8) 'should require the application of the unit price basis in the computation of the increase to the contract price in this instance,'

"(a) for the reason such fact was not found by the trial Court, and there is nothing in the record to show the parties intended that paragraph 8 of the Specifications should apply to this additional work and material. To the contrary, the record made in the trial Court and appellant's original brief filed in this court and the opinion of the trial Court show or indicate that neither plaintiff nor defendant considered paragraph 8 of the Specifications as applicable here; that the defense made to this claim was on grounds or theory entirely different and bore no relation to paragraph 8 or any other provisions of the contract, but was based on a theory of an error of fact as to price made by the contractor in submitting his proposal.

"*Third*, the learned Court further erred in applying the provisions of paragraph 8 of the Specifications as a ground for the reversal of the trial Court and to the defeat of plaintiff and appellee's claim here,

"(a) for the reason that the provisions of said paragraph 8 are not applicable since said provisions relate to and deal with 'alterations or changes in the plans of the work or to correct any errors or omissions in the contract or plans or specifications' and do not relate to nor purport to include 'additional or extra work to be done on order of the City in connection with the work.'

"*Fourth*, the learned Court further erred in holding that 'It is of no legal consequence that the Contractor's original bid upon the house service pipe was erroneously submitted at a figure substantially below the cost to him,' (meaning thereby to hold, in effect, as we understand it, that there is no legal relief from loss suffered by a party to a contract as the result of his *error in fact* in the execution of the contract, however serious may be the loss to the enrichment of the other party),

"(a) for the reason that such ruling is contrary to the provisions of the Revised Civil Code of the State of Louisiana and the decisions of the courts of this State in applying and interpreting said codal provisions; that, under the Revised Civil Code of the State of Louisiana and the decisions of the courts of this State, plaintiff and appellee, even though there were applicable provisions of the contract, would in any event be entitled to the relief sought and granted by the trial court, due to the serious, honest error in fact made by him, to the knowledge of defendant and appellant, in submitting his unit price bid on this item of house service pipe, and a denial of the relief would result in the enrichment of the defendant and appellant at the loss and expense of the appellee."

13.

On the 2nd day of June, 1942, the Circuit Court of Appeals denied the petition for rehearing without reason given (R. 278).

B.

Summary of the Matter Involved and Petition for Relief Sought.

1.

This petition for certiorari or relief relates solely to the alleged errors of the Circuit Court of Appeals in reversing in part the judgment of the trial court, and to the extent that the judgment allowed petitioner the sum of $6,556.48, with legal interest thereon from January 11, 1932, until paid, and being the amount covered by claim No. 2 above stated for additional compensation, on a quantummeruit basis, for the installation of 40,978 linear feet of house service pipe in excess of the call of the contract.

2.

Petitioner, as the lowest bidder by some $31,000, on a unit price proposal and bid, for the construction of the sewerage project, was awarded the contract (R. 216-217). The proposal submitted to prospective bidders and on which bids were submitted covering the house service pipe called for 40,000 linear feet (R. 189-194). Petitioner's bid on this 40,000 linear feet of pipe was 26¢ per linear foot (R. 194, Item 71). The price of other bidders on this unit item ranged from 44 cents to 75 cents per linear foot (R. 25, 26).

3.

The error made by petitioner in submitting unit price bid on this pipe was caused by his failure in preparing his bid under rather adverse circumstances to add to the labor cost, 26 cents per linear foot, the cost of the pipe or material, 16 cents per linear foot (R. 77). Petitioner did not discover this error until after the execution of the contract.

4.

The trial judge found facts as to this claim as follows:

> "Before plaintiff had installed the approximate 40,000 linear feet of house service pipe called for by the contract, the defendant had full knowledge of the fact that plaintiff had made an error in his bid and was installing under protest any quantity of house service pipe in excess of the contract and that for such excess quantity he intended to urge a claim for an increased price.
>
> "Plaintiff concedes that an overrun of 5% or 2000 linear feet would be the approximate of 40,000.
>
> "Though exceeding by sixteen cents the price erroneously fixed in the contract, a charge of forty-two cents per linear foot was a fair price for the 40,978 feet of house service pipe installed by plaintiff in excess of 42,000 linear feet" (R. 258).

The trial judge further found, in effect, in his opinion that "the legal evidence is all one way" that when petitioner realized the respondent intended to require him to install more than double the amount of house service pipe called for in his contract, and at the time he had installed about 32,500 feet of such pipe, he gave notice to the respondent that if it required and compelled him to install a quantity in excess of the call of the contract, he would be compelled to make an additional charge for any excess quantity of pipe installed on a cost basis due to the error in his bid (R. 253-254); that in spite of this notice and respondent's knowledge that plaintiff had made serious error in his unit price bid on this item, the respondent, acting through its supervising engineer, ordered petitioner to furnish and install 82,978 linear feet of such pipe, or 40,978 linear feet in excess of an approximate of 40,000 feet, which approximate quantity the trial court fixed at 42,000 (R. 253, 254).

5.

The learned trial judge found in his "Conclusions of Law" as to this claim as follows: "Plaintiff is entitled to recover on a quantum meruit basis for the quantity of house service pipe installed in excess of the contract, and his claim in the amount of $6,556.48 for additional compensation at 16¢ per linear foot on 40,978 linear feet is just" (R. 260).

6.

The learned Circuit Court of Appeals found or gave as a basis for its ruling reversing the judgment of the trial court as to this claim the following:

> "The direct appeal presents two questions, the first of which involves a dispute over the amount payable under the contract for extra work done pursuant to a change in the plans after the contract had been let. The original specifications, upon which the contractor's bid was based, called for the installation of approximately 40,000 linear feet of house service pipe. The City was authorized by the contract to increase the amount of the pipe to be installed, which right it exercised by requiring that a total of 82,978 linear feet of pipe be installed. The contractor claims that he was entitled to 72¢ per linear foot for the extra installation, and the City contends that the contract fixed the price therefor at 26¢ per linear foot.
>
> "The contractor's bid was made upon a unit-price basis, and his bid on the house service pipe was 26¢ per linear foot. Section 8 of the general specifications of the contract provided that, if changes in the plans increased the cost of the work, the contract price should be increased in an amount computed by using the unit prices given by the contractor in his bid as the price for such additional work wherever such basis was applicable. It appears that the parties intended this provision should require the application of the unit-price basis in the computation of the increase to the con-

tract price in this instance, and it is of no legal consequence that the contractor's original bid upon the house service pipe was erroneously submitted at a figure substantially below its cost to him. The contract entitled the City to this additional work at the price of 26¢ per linear foot; that price was paid, and the claim for additional compensation by reason thereof should not have been allowed" (R. 270).

Jurisdiction.

Petitioner claims that this court has jurisdiction to issue a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, under Section 240, Judicial Code, as amended, being Section 347, Title 28 U. S. C. A. and in accordance with Rule 38 of this court, in that the decision of the Court of Appeals decides an important question of local law contrary to the law of the State of Louisiana resulting in serious financial loss to petitioner to the enrichment of the respondent.

That the decision of the Circuit Court of Appeals departs from the accepted and usual course of judicial proceedings in appellate courts in that the Circuit Court of Appeals raised of its own motion and reversed the judgment of the learned trial judge thereon an issue or question that had not been urged and submitted to the trial court and on which the learned trial judge was not called on to consider or determine, and has erroneously decided the question so raised by it, as shown by the contract (R. 197-198).

C.

Reasons Relied On for Allowance of the Writ.

Petitioner respectfully appeals to this Honorable Court for the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals as to this claim in order to obtain relief from a serious financial loss to the

enrichment of the respondent, and respectfully submits that a proper case for the issuance of a writ of certiorari is presented, in that:

(1) The decision of the Circuit Court of Appeals as to the claim in question is contrary to the law of the State of Louisiana and the evidence, as shown by the record, and is at variance with the facts as found by the learned trial judge;

(2) The decision of the Court of Appeals is in error as to the law in that it has decided an important question of local law in conflict with the applicable codal law of the State of Louisiana and decisions of the highest courts of the State in holding that petitioner was without relief from a serious unilateral error of fact, particularly in holding that "it is of no legal consequence that the contractor's" (petitioner's) "original bid on the house service pipe was erroneously submitted at a figure substantially below its cost to him," (R. 271), thus ignoring the applicable law of the State of Louisiana and apparently applying or adhering to the general common law rule contrary to the decisions of this Honorable Court that there can be no relief *in law* from a unilateral error of fact in the execution of a contract, a ruling not only contrary to the applicable law and decisions of the courts of the State of Louisiana, but contrary to the equity jurisprudence of the Federal Courts of the United States, including the decisions of this Honorable Court;

(3) That the decision of the Circuit Court of Appeals departs from the accepted and usual course of judicial proceedings in appellate courts of the United States in that the Circuit Court of Appeals raised of its own motion and reversed the judgment of the learned trial judge on an issue or question that had not been urged and submitted to the trial court by the respondent as a defense to this claim,

and a question which the learned trial judge was neither called on to consider nor to determine;

(4) The decision of the learned Court of Appeals, having erroneously refused to grant relief from the serious error of fact made by petitioner in submitting his bid, and having erroneously invoked of its own motion the provisions of paragraph 8 of the Specifications made part of the contract as grounds for a reversal of the judgment of the learned trial judge, further erred in applying the provisions of paragraph 8 of the Specifications to the factual situation, in that said paragraph relates to or deals with "*alterations or changes in the plans of the work or to correct any error or omission in the contract or plans or specifications,*" (R. 198) and does not relate to nor purport to include "*additional or extra work to be done on order of the city in connection with the work,*" such as was the character of the additional 40,978 linear feet of house service pipe supplied by petitioner on order of the respondent. That if there be applicable provision of the contract, and it be held that such applicable provision could not be changed or affected by a serious unilateral error of fact, such applicable provision is *paragraph 6* of the Specifications, which provides that "*In case the City orders any additional work to be done in connection with this work not covered by the unit items, the price which the contractor shall be paid for this extra work shall be fixed upon the following basis: Contractor shall be compensated for the actual cost of all labor in connection with the extra work and all material which forms a composite part of the finished work.*" (R. 197).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, commanding said court to certify and send to this Court, on

a day to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case therein entitled "City of Baton Rouge, Louisiana, Appellant and Cross-Appellee, versus George J. Robinson, Appellee and Cross-Appellant, (And Reverse Title)," No. 9939, to the end that said case may be reviewed, to the extent and insofar as it reverses in part the judgment of the trial court, as authorized by Judicial Code Section 240, as amended, and being Section 347, Title 28, U. S. C. A., and in accordance with Section 38 of the rules of this Court, and particularly paragraph (b) of paragraph 5 of said Rule 38, or that your petitioner may exercise such other or further remedy or relief in the premises as to this Honorable Court may seem appropriate and just, and in conformity with said act and rule, and that said judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court and the judgment of the trial court reinstated and affirmed.

And petitioner further prays for all general and equitable relief.

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